

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

TRACY GENE BAGWELL, <i>ET AL.</i>	§	
<i>Plaintiffs,</i>	§	
	§	
VS.	§	CIVIL ACTION H-06-3595
	§	
RIVAL CONSUMER SALES CORP., <i>ET AL.</i> ,	§	
<i>Defendants.</i>	§	

ORDER

This products liability case is before the court on plaintiffs' motion to strike defendants designation of responsible third parties. Having considered the parties' submissions and the law, the court concludes that plaintiffs' motion should be granted in part and denied in part.

I. BACKGROUND

This lawsuit arises out of a fire on February 28, 2004 in which three people died. Plaintiffs, family members of the deceased, allege that the fire was caused by a defective space heater designed, manufactured, and/or marketed by defendants. Plaintiffs' allege, among other things, that defective or unsuitable plastic was used in the housing of the heater.

The Rival defendants¹ filed an unopposed designation of responsible third parties pursuant to Texas Civil Practice and Remedies Code § 33.004 naming Teijin Chemical Company, Ltd, GE Plastics, Samsung General Chemical Co., Ltd., and Chi Mei Industrial

¹ The Rival defendants refers collectively to Rival Consumer Sales Corporation, The Rival Company, The Holmes Group, Inc. and JCS/THG LLC.

Co. as possible suppliers of the plastic resin to the manufacturer of the heater. After defendants' designation, plaintiffs amended their complaint to join the designated responsible third parties as defendants in this action.² Plaintiffs now seek to strike the designation of responsible third parties on the ground that there is insufficient evidence to prove that any one of them supplied the plastic used in manufacturing the heater.

Defendants do not oppose plaintiffs' motion to strike the designation of Teijin Chemical Co., Ltd, GE Plastics, or Chi Mei Industrial Co., Ltd. as responsible third parties. Defendants oppose plaintiffs motion to strike the designation of Samsung General Chemicals Co., Ltd. as a responsible third party.

II. LEGAL STANDARDS

The purpose of the "designated responsible third party" is to permit a liable defendant to avoid joint and several liability. The designated responsible third party is not made a party to the action and cannot be found liable based on the designation. TEX. CIV. PRAC. & REM. CODE § 33.004(i). After an adequate period for discovery, a plaintiff can move to strike the designation on the ground that there is "no evidence" that the designated person is responsible for the plaintiff's injury or damage; the court shall grant the motion unless the defendant presents "sufficient evidence to create a genuine issue of fact regarding the designated person's responsibility." *Id.* at § 33.004(1).

² Predictably, Teijin and Samsung have moved to dismiss plaintiffs' complaint against them for lack of personal jurisdiction, and Chi Mei has been granted an extension of time of respond pending resolution of the motion to strike the designation. The motions to dismiss are not before this court.

Evidence in discovery has revealed that the heater at issue was purchased at a Wal-Mart shortly before the fire on February 28, 2004. Defendants have presented testimony indicating that typically a heater purchased in that time frame would have been manufactured in 2003. Defendants contend that records regarding suppliers to the manufacturer of the heater, to the extent they exist, are in the possession of the factory in China where the heater was manufactured. No deposition of a factory representative has occurred in this case to date.

The only records defendants have so far procured from the factory consist of e-mails from a factory representative stating that the housing for a heater purchased in August 2003 “came from Samsung.” The e-mail correspondence indicates that “Samsung” refers to an entity known as Samsung General Chemicals Co., Ltd. pre-August 2003, as Samsung Atofina Co. Ltd. in August 2003, and as Samsung Total Petrochemicals Co. Ltd in October 2004.³ Defendant also has produced a list of purchase orders indicating that between March 2002 and November 2003 the factory purchased from Samsung Total Petrochemicals plastic resin like that used in the heater in question.⁴

Plaintiffs argue that defendants’ evidence “is insufficient to show that Samsung was the supplier of the plastic pellets actually used in the manufacture of the heater housings for

³ Defendants also move for leave to file an amended designation naming Samsung General Chemicals Co., Ltd, Samsung Total Petrochemicals, and Samsung Atofina Co. as responsible third parties (Dkt. 98). That motion is not before this court.

⁴ See Exhibits 1-5 to defendants’ response.

TCM-16 heaters sold from the Wal-Mart in Porter, Texas in 2003.”⁵ Plaintiffs may be correct that defendants’ evidence is not legally conclusive. But that is not their burden. In response to plaintiffs’ motion to strike, defendants are required only to create a fact issue regarding Samsung’s responsibility. They need not produce evidence that proves Samsung’s responsibility with 100% certainty. *See Hegwood v. Ross Stores, Inc.*, Civil Action No. 3:04-CV-2674, 2007 WL 14256, slip op. *2 (N.D. Tex. Jan. 3, 2007).

The court further notes that the discovery deadline in this case is not until June 2008. The parties apparently anticipate taking the deposition, possibly in Hawaii, of a representative of the factory in China that manufactured the heater.⁶ No discovery has been taken from Samsung to date.⁷ Plaintiffs’ motion to strike the designation of Samsung General Chemicals Co., Ltd. is thus premature.

III. CONCLUSION AND ORDER

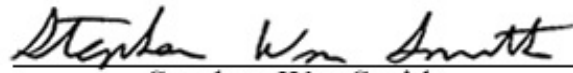
For the reasons discussed above, plaintiffs’ motion to strike the designation of responsible third parties (Dkt. 89) is granted as to Teijin Chemical Co., Ltd, GE Plastics, and Chi Mei Industrial Co., Ltd. The motion is denied as to Samsung General Chemicals Co., Ltd. without prejudice to refile after discovery is closed.

⁵ Plaintiffs’ reply, at 3.

⁶ Defendants’ response, at 5.

⁷ Defendants’ sur-reply, at 5.

Signed at Houston, Texas on September 26, 2007.



Stephen Wm Smith
United States Magistrate Judge